IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

AMBER ARD
AND JOHN DOES 1-10 PLAINTIFF

VS. CIVIL ACTION NO. 3:12cv2-TSL-JMR

STEVE RUSHING, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS
SHERIFF OF LINCOLN COUNTY, MISSISSIPPI;
TIM MILLER, INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY AS JAILOR/DEPUTY OF
LINCOLN COUNTY, MISSISSIPPI; LINCOLN
COUNTY, MISSISSIPPI; AND JOHN DOES 1
THROUGH 10 DEFENDANTS

MEMORANDUM OF AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS FOR FAILURE TO DISCLOSE OR PRODUCE EVIDENCE AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Plaintiff, Amber Ard, by and through counsel, and files this her Memorandum of Authorities in Support of her Motion for Sanctions for the Defendants' Failure to Disclose or Produce Evidence and in Opposition to the Defendants' Motion for Summary Judgment [Docket No. 58], in this action, in accordance with Rule 7 of the *Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi*, and Rule 56 of the *Federal Rules of Civil Procedure*. As set forth in the original Response filed in this action and in her Memorandum of Authorities submitted simultaneously herewith, as well as based upon the facts and authorities controlling the adjudication of this civil action, genuine issues of material facts exist upon which a trial is warranted, pursuant to Rule 56(c) of the *Federal Rules of Civil Procedure*. Plaintiff therefore submits the following that the Defendants' motion must be denied.

Facts

On November 23, 2011, the Plaintiff commenced this action against the Defendants, Steve Rushing, individually and in his official capacity as Sheriff of Lincoln County, Mississippi; Tim Miller, Individually and in his Official Capacity as Jailor/Deputy of Lincoln County, Mississippi; Lincoln County, Mississippi; and John Does 1 through 10. On August 30, 2012, this Court granted partial summary judgment as to qualified immunity against Rushing individually. Miller has never filed any disposition motions in this case. Therefore, all claims remain against Rushing officially, Lincoln County, and Miller.

On October 2, 2013, Defendants, Rushing and Lincoln County, filed their present Motion for Summary Judgment in this action. [Docket No. 58]

On November 1, 2013, the Plaintiff filed her original Response to the Defendants' current motion for summary judgment. [Docket No. 63.] In that filing, as well as in her Memorandum in Opposition to the Defendants' motion [Docket No. 64], the Plaintiff submitted an affidavit from Ralph Todd Willis, Jr., who is counsel for Crystal Gayle Smith, who was not previously disclosed to the Plaintiff regarding similar claims.

As noted in the Plaintiff's Memorandum in Opposition to the motion for summary judgment, counsel for the Plaintiff did not discover that a similar action had been filed against Defendants in the very same court until June of 2013 and that the Plaintiff herein would promptly supplement her previous filing to include an affidavit from Crystal Gayle Smith. [Docket No. 64, pages 15-16.] At the time of the filing, the Plaintiff submitted the affidavit of Attorney Willis, pursuant to Rule 56(f) of the *Federal Rules of Civil Procedure*, inasmuch as his client had been wholly unavailable to provide an affidavit to the Plaintiff, due to her recent surgery. [*See* Exhibit "2" to Plaintiff's original Response; Docket No. 63.]

The Plaintiff then attached to and incorporated in, as Exhibit "1" to, her Supplemental Response the affidavit of Crystal Gayle Smith, which had then been received from her counsel.

The Plaintiff thus supplemented her original Response with this affidavit, in which Crystal Gayle Smith verifies that Sheriff Rushing knew or should have known of the fact that Timothy Miller entered the women's block of cells in the Lincoln County Jail, and that she has also given statements to the District Attorneys for Lincoln and Pike Counties.

This supplementation was made well in advance of any reply brief from the Defendants, it was made pursuant to Rule 15 of the *Federal Rules of Civil Procedure*, and it is made on facts that were not previously disclosed by the Defendants in their responses to discovery or in any other disclosure filed with this Court or served on Plaintiff's counsel.

Moreover, in his deposition taken in this case on May 24, 2012, Sheriff Rushing even disavowed any knowledge of an inmate named “Crystal” at the time allegations were made against Defendant Timothy Miller. [Docket No. 58-4, Exhibit “D” to the Defendants’ Motion for Summary Judgment, at page 47.] The veracity of the sheriff’s sworn testimony therefore is in direct conflict with this additional evidence, such that there clearly exists a question of fact for a jury’s determination.

The Defendants cannot be heard by this Court to be surprised or prejudiced, when the information regarding the rape of Crystal Gayle Smith by Miller had long since been known to the Sheriff and Lincoln County, through its District Attorney. Nothing was done to prevent the rape of Amber Ard or to otherwise protect her from Miller, when knowledge of the prior attacks was clearly known to the Defendants. Nothing was done to properly supervise Miller under these circumstances. Indeed, the Defendants wholly failed to disclose any of the information of the rape of Crystal Gayle Smith, despite her even having given statements to the District Attorney for Lincoln and Pike Counties, who is Dewitt (Dee) Bates, Jr., whose district covers both counties in the 14th Circuit Court District of Mississippi and which is a matter of public record. Hence, this information was clearly made known to Defendant Lincoln County, as well.

On November 12, 2013, after the close of discovery and after the Plaintiff had already filed and submitted her Response and Supplemental Response to the Defendants’

Motion for Summary Judgment, counsel for the Defendants produced, for the first time, a written statement obtained from an investigator with the Lincoln County District Attorney's office, named Truett Simmons. Attached to and incorporated in the Plaintiff's Motion for Sanctions, as Exhibit "1", is a true and correct copy of the email from Defendants' counsel, Will Allen, indicating that, for the first time, he was producing this statement, even though it had been in the possession of Defendant, Lincoln County's investigator, Truett Simmons, since at least August 26, 2010. However, clearly from the tenor of the statement and the sequence of such events, it appears that the facts contained in the statement had already been made known to the Lincoln County District Attorney, Dee Bates.

Mr. Allen represented to Plaintiff's counsel that he had just become aware of the statement on October 9, 2013; however, no mention is made of how long the statement had been known to his clients, both Lincoln County and Sheriff Rushing. Furthermore, the copy produced by Mr. Allen contained a facsimile transmission page which indicated that the document had been sent to the law firm of Wyatt Tarrant & Combs, in Jackson. One of the principals in that law firm is J. Lawson Hester, who has represented multiple governmental entities over many years of practicing law, for violations of individual's civil rights, as are at issue in this case. Mr. Allen therefore makes no disclosure as to how long the Wyatt law firm and/or Mr. Hester have known of the existence of the statement or the facts contained in the statement.[1] Attached hereto and incorporated herein is the copy of the statement which was produced for the first time on November 12, 2013, more than three years after it was taken and more than two years after this civil action was commenced, as Exhibit “2" to the Plaintiff’s Motion for Sanctions.

On or about May 9, 2012, Defendant Rushing responded to requests for production of document propounded in this litigation. These Responses are attached to Plaintiff’s Motion for Sanctions, as Exhibit “3". Defendants’ counsel, Will Allen, signed the responses, as well. In Request No. 3, documents are specifically sought regarding “incident reports, written correspondence, investigative reports, regarding any instances known by you or documented by the Lincoln County Sheriff’s Department in which Timothy Miller, jailer at the Lincoln County Jail, was accused by female inmates of the Lincoln County Jail of sexual harassment, sexual abuse, or other physical abuse toward such female inmates of the Lincoln County Jail.” The response, other than a boiler plate objection, did not contain the statement, which by then had already been in the possession of Lincoln County for over one and one-half years.

On February 7, 2013, Lincoln County and Sheriff Rushing submitted their Initial Disclosures, as required by Rule 26(a) and (e) of the *Federal Rules of Civil Procedure*. Attached to and incorporated in Plaintiff’s Motion for Sanctions are these disclosures, as

[1] Incidentally, Mr. Allen represents Lincoln County and Sheriff Rushing, not Wyatt Tarrant & Combs or Mr. Hester, in the lawsuit filed by Crystal Gayle Smith in this Court. *See Smith v. Lincoln County, et al.*; Civil Action No. 3:12-cv-583.

Exhibit "4". No mention is made of any documents regarding statements made by Crystal Gayle Smith or even of her arrest record. Such disclosure has not to date even been supplemented, as required by Rule 26(e) of the *Federal Rules of Civil Procedure*.

On November 15, 2013, the Defendants, Lincoln County and Sheriff Rushing, filed their Rebuttal/Reply to the Plaintiff's Response in Opposition to the Defendants' Motion for Summary Judgment. [Docket No. 69.][2] Attached to that Rebuttal/Reply is an affidavit from investigator Truett Simmons with the statement of Crystal Gayle Smith attached to it. [See, Exhibit "P"; Docket No. 69-2.] Missing from the document is the facsimile transmission page, in which the statement was provided to the Wyatt law firm.

At no time throughout the pendency of this case, until November 12, 2013, had the Wyatt law firm's involvement even been made known to Plaintiff's counsel, and as stated above, the statement of Crystal Gayle Smith had never been disclosed by Defendant Lincoln County, as required. Questions therefore arise as to the knowledge of these persons and entities and the period in which it was made known.

Defendants' counsel, Will Allen, represents to this Court that neither the statement of Ms. Smith or the facts of the sexual assault by Miller on Ms. Smith was not known to the Defendants prior to the assault on the Plaintiff; however, he provides no evidentiary support for this contention. Moreover, the Defendants have clearly violated the rules of discovery and the disclosure orders of this Court. Sanctions are due for such violations.

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[2] Plaintiff's counsel would submit to the Court that this Motion for Sanctions would have been presented sooner to the Court; however, after the Defendants filed their Reply/Rebuttal with the affidavit of Truett Simmons and statement of Crystal Gayle Smith, Plaintiff's counsel suffered from the flu and upon recovery began the task of preparing this motion and memorandum of authorities.

In accordance with Rule 37(a) of the *Federal Rules of Civil Procedure*, the Plaintiff would propose to the Court the following sanctions for such wilful and wrongful violations:

a. denial of the Defendants' motion for summary judgment;

b. strike the Defendants' Reply in support of their motion for summary judgment;

c. reopen discovery for the Plaintiff's to depose investigator Simmons, attorney Hester, Crystal Gayle Smith, District Attorney Bates and Sheriff Rushing;

d. strike the Defendants' Answers and Affirmative Defenses to the Plaintiff's Complaint and enter a Default Judgment;

e. award attorney fees, costs and expenses against the Defendants, and each of them; and

f. such other relief as the Court may deem appropriate.

Therefore, genuine issues of material facts exist, upon which a trial is warranted in this matter. Based upon these facts and the authorities submitted simultaneously herewith, Summary Judgment must be denied.

ARGUMENT AND AUTHORITIES

Substantial prejudice has been suffered by the Plaintiff, due to this above delineated failure of the Defendants to produce or disclose the statement of Crystal Gayle Smith. This Court has the inherent authority to impose appropriate sanctions for such discovery abuse. Rule 37(b) of the *Federal Rules of Civil Procedure*, authorizes this court to fashion sanctions, including barring the Defendants from presenting evidence to refute a claim or support a defense, striking the Defendants' pleadings or motions, award attorney fees, costs and expenses, and even enter a default judgment against the Defendants. *See Degen v. U.S.*, 517 U. S. 820, 827 (1996); *Carroll v. Acme-Cleveland Corp.*, 955 F. 2d 1107, 1115-16 (7th Cir. 1992); and *Lee v. Max International*, 638 F. 3d 1318, 1320-21 (10th Cir. 2011).

The failure of the Defendants to disclose this evidence as required by Rule 26(a) may subject the Defendants to sanctions as well. *F. R. Civ. P.* 37(c)(1). This failure to disclose or otherwise have produced this evidence in response to a specific discovery request is not a matter of merely being overlook or harmless. Indeed, courts have made sanctions mandatory under Rule 37(c)(1). *Bessemer & Lake Erie R.R. v. Seaway Mar. Trans.*, 596 F. 3d 357, 370 (6th Cir. 2010); *Ortiz-Lopez v. Sociedad Espanola*, 248 F. 3d 29, 33 (1st Cir. 2001).

Mr. Allen argues for the Defendants that the statement was not known and that, even if known, the events described by Crystal Gayle Smith were not known prior to the sexual assault on the Plaintiff, even though Ms. Smith was raped before the Plaintiff was. Such an argument is wholly disingenuous, inasmuch as the Plaintiff has not even been provided the opportunity, through discovery, to have even known about the rape of Crystal Gayle Smith prior to November 12, 2013. Certainly, had the proverbial shoe been on the other foot, Mr. Allen would have presented a motion for sanctions on behalf of the Defendants. In short, the Defendants have been caught red-handed in a discovery violation, and they have impugned the integrity of the civil justice processes of this Court. Indeed, as noted above, the Plaintiff should be allowed to depose the attorneys at Wyatt law firm, including Lawson Hester, to depose investigator Truett Simmons, to depose Crystal Gayle Smith, and to re-depose Sheriff Rushing, who obviously misrepresented the fact that Ms. Smith's rape was known to Lincoln County, prior to his own deposition, at the very latest. The Defendants should be compelled to pay for these depositions, as well.

This Court certainly has the authority to prevent the introduction of such evidence as a defense for the Defendants or as supportive of their motion for summary judgment. *Esposito v. Home Depot U.S.A., Inc.*, 590 F. 3d 72, 77 (1st Cir. 2009); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 104-5 (D.N.J. 2006)(court struck Defendants' evidence not produced in discovery but only produced when impact would be most severe).

On this basis and the tenets of Rules 37(b)(2)(A) and (c)(1)(A) of the *Federal Rules of Civil Procedure*, this Court should at the very least deny the Defendants' motion for summary judgment and ward the Plaintiff attorney fees, costs and expenses. *Fed. R.*

Civ. P. 37(b)(2)(C). *O'Neill v. AGWI Lines*, 74 F. 3d 93, 96 (5th Cir. 1996). It is not a requirement that the Plaintiff have first sought and obtained a motion to compel, concerning facts that were not known by the Plaintiff or otherwise disclosed by the Defendants. *Charter House Ins. Brokers v. New Hampshire Ins.*, 667 F. 2d 600, 604 (7th Cir. 1981).

CONCLUSION

Based upon the above and foregoing facts and authorities, the Plaintiff respectfully moves the Court to grant her Motion for Sanctions, to grant the requested sanctions sought herein, and to deny the Defendant's motion for summary judgment, in accordance with Rules 37 and 56(c) of the *Federal Rules of Civil Procedure*. Further, the Plaintiff moves the Court for such other relief, either general or specific, as the Court may deem appropriate.

RESPECTFULLY SUBMITTED, this the 19th day of December, 2013.

AMBER ARD, Plaintiff

BY: *\/s/ Paul A. Koerber*
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CERTIFICATE OF SERVICE

The undersigned counsel for the Plaintiff, Paul A. Koerber, does hereby certify that on this day, he served, via electronic filing with the Court, in accordance with Rule 5 of the *Federal Rules of Civil Procedure*, the above and foregoing Memorandum of Authorities in Support of Plaintiff's Motion for Sanctions and in Opposition to Defendants' Motion for Summary Judgment, upon the following counsel of record for the Defendants:

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SO CERTIFIED this the 19th day of December, 2013.

/s/ Paul A. Koerber
Paul A. Koerber